BANQUE NATIONALE DE PARIS

v.

LEE CHIONG WOO

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[ORIGINATING SUMMONS NO: 24-354-99-III(II)]
5 SEPTEMBER 2002

CIVIL PROCEDURE: *Appeal - Stay of execution - Foreign judgment - Application for stay pending appeal against refusal to set aside foreign judgment - Whether special circumstances existed for grant of stay - Payment of judgment sum to foreign plaintiff - Whether against Exchange Control Act 1953 - Rules of High Court 1980, O. 45 r. 2(1), O. 22 r. 9(1)*

The plaintiff had obtained a default judgment against the defendant for USD 10 million in the High Court, Republic of Singapore ('the Singaporean judgment') and had registered same in the High Court of Sabah and Sarawak at Kuching. The defendant applied to set aside the judgment but the application was dismissed by the court. The defendant appealed against the dismissal, and pending that applied for a stay of execution of the Singaporean judgment. Before the learned judge, the defendant argued that a stay order ought to be granted as: (i) it would be impossible for him to get the remittance if the appeal is successful, the plaintiff being a foreigner; and (ii) any payment out by him to the plaintiff would contravene the provisions of Exchange Control Act 1953. The main issue that arose was whether there were special circumstances existing in this case as to warrant the grant of stay.

Held:

[1] There were no special circumstances existing as would justify the grant of stay. It is clear that by O. 45 r. 2(1) Rules of High Court 1980 ('RHC'), the defendant must pay the judgment debt into court. It is also clear that the plaintiff, after such payment, would have to apply to court for payment out pursuant to O. 22 r. 9(1) RHC. Further, such payment out also requires the consent of the Controller of Foreign Exchange. This being the case, there was no need for the defendant to feel concerned about the refund of the remittance. (pp 130 g & 131 a, c)

[2] The plaintiff is a reputable bank. Therefore, any losses that the defendant may suffer as a result of the payment of the judgment sum could be recovered in the event that the defendant is successful in the appeal. (p 131 f)

[3] There was no attempt by the defendant to set aside the judgment in default in the Singapore High Court. The Singaporean judgment therefore is a final judgment which the plaintiff is at liberty to enforce. (p 132 c)

[Application for stay refused.]

Case(s) referred to:

American Express Sdn Bhd v. Dato' Wong Kee Tat & Ors [1990] 1 CLJ 17; [1990] 1 CLJ (Rep) 1 SC ***(refd)***

Bank of New Zealand v. Wong Kee Tat [1990] 1 CLJ 1130; [1990] 1 CLJ (Rep) 662 HC ***(refd)***

Gan Boon Kyee v. Yap Hong Sin [1997] 3 CLJ 822 CA ***(refd)***

Liong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***

Peh Teck Quee v. Bayerische Landesbank Girozentrale [2000] 1 SLR 148 ***(refd)***

Tropiland Sdn Bhd v. DCB Bank Bhd & Ors [2000] 1 CLJ 568 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 22 r. 9(1), O. 45 r. 2(1)

For the plaintiff - Gabriel Wong; M/s Ting Goh & Assoc
For the defendant - Rosleenda Sayumi; M/s Idris & Co

Reported by WA Sharif

JUDGMENT

Zakaria Sam JC:

This is the defendant's application by way of summons-in-chamber dated 29 June 2001 for stay of execution pending appeal in respect of the ruling made by this court on 21 November 2000 dismissing his application to set aside the Singaporean judgment.

Background

The defendant is a guarantor to a credit facility offered to the borrower to the extend of the amount USD10 million by plaintiff on 25 February 1997, a Singapore offshore bank. The facility was for general investment purposes. The defendant executed a personal guarantee dated 12 October 1995.

On 12 August 1999, the plaintiff obtained judgment in default against the defendant in the High Court of the Republic of Singapore ("the Singaporean Judgment"). On 14 December 1999, the Singaporean Judgment was duly registered in the High Court in Sabah and Sarawak at Kuching. The Order for Registration of Foreign Judgment was served on the defendant on 24 February 2000.

The defendant filed a summons-in-chambers dated 3 March 2000, to set aside the registration of the Singaporean Judgment.

On 21 November 2000, after hearing submission from counsels from both parties, the said application was dismissed.

Being dissatisfied with the said decision, the defendant filed a Notice of Appeal to the Court of Appeal on 21 December 2000.

The defendant then, on 29 June 2001, filed this summons-in-chambers for an order for stay of execution pending the abovesaid appeal. In his affidavit, the defendant gave two main grounds to demonstrate special circumstances warranting a stay:

(i) If payment out has been made to the plaintiffs, then in the event his appeal is successful, it would be impossible to get remittance as the plaintiffs are foreigners; and

(ii) The payment out would contravene the provision of the Exchange Control Act 1953 (the ECA) and the ECM notices issued thereunder which requires prior permission of the Controller of Foreign Exchange to be obtained before the granting of the Facility to him.

Findings

Special circumstances have been defined by Raja Azlan Shah (as His Majesty then was) in *Liong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86.

> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excel in some way than that which is usual or common.

Both the defendant's grounds in support of his application do not reflect that there are special circumstances, which justifies the grant of stay of execution.

(1) The defendant's contention could be rebutted by O. 45 r. 2(1) RHC 1980 which provides:

> Where any person is directed by any judgment to pay any money to or for the credit of a person who is resident outside the scheduled territories, he must, unless the Controller has given permission for the payment under the Exchange Control Act, 1953, unconditionally or upon conditions which have been complied with, pay the money into court.

(2) Even if the judgment debt has been paid into court, the plaintiff would still have to apply to court for payment out of court of that money pursuant to O. 22 r. 9(1) RHC 1980 which reads:

> Where money has been paid into Court in any cause or matter pursuant to the Exchange Control Act 1953, or an order of the Court made thereunder, any party to the cause or matter may apply for payment out of Court of that money.

It was held in *Bank of New Zealand v. Wong Kee Tat* [1990] 1 CLJ 1130; [1990] 1 CLJ (Rep) 662, that:

> Monies due under judgments can be paid into court thus discharging the debtor; and the fund itself remains out of the control of the creditor until consent had been obtained.

(3) Pending the disposal of the appeal, the debtor does not even need to concern itself about the refund of its remittance since the monies have been paid into court. Payment out requires consent of the Controller of Foreign Exchange.

(4) The ECA 1953 shall not be construed as preventing the payment by the defendant of the judgment sum into court. See *American Express Sdn Bhd v. Dato' Wang Kee Tat & Ors* [1990] 1 CLJ 17; [1990] 1 CLJ (Rep) 1.

(5) The ECA 1953 does not provide a moratorium from debtors but only controls the immediate destination of the payments they make. See *American Express*'s case *(supra)*.

(6) The judgment is a monies judgment, no irreparable harm would befall the defendant. Any losses, if any, the defendant may suffer could easily be quantified and/or recovered in the event the defendant was successful in the appeal. Plaintiff is a reputable bank. No evidence that plaintiff was or would be insolvent. See *Tropiland Sdn Bhd v. DCB Bank Berhad & 2 Ors* [2000] 1 CLJ 568.

(7) The Facility Letter does not restrict payment into court;

(8) There was substantial delay on the part of the defendant in filing the application for a stay of execution. The Notice of Appeal against the decision of this court was filed on 21 December 2000. It has taken the defendant almost seven months to file this application for a stay of execution without any explanation for the delay. It is axiomatic that the

law assists the vigilant, not the indolent. (*Gan Boon Kyee v. Yap Hong Sin* [1997] 3 CLJ 822, at 601 and *Peh Teck Quee v. Bayerische Landesbank Girozentrale* [2000] 1 SLR 148.)

(9) The defendant in fact, had written to the Controller of Foreign Exchange for consent or permission for the payment out which consent is still pending (see exh. LCW1 to the defendant's affidavit-in-reply). This conduct of the defendant tantamount to an admission that the plaintiff is entitled to the judgment sum. His responsibility here is to deposit the money into court and let the plaintiff do the necessary and take out the money as provided for under O. 22 r. 9 RHC.

(10) As to date there is no attempt by the defendant to set aside the judgment-in-default in the Singapore High Court. Therefore the Singapore judgment is a final judgment and the plaintiff is at liberty to enforce it.

Conclusion

The defendant's application for stay of execution is dismissed with costs.